

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

Clerk's Minutes  
Before the Honorable James O. Browning

**CASE NO.** No. CR 22-1910 JB **DATE:** 1/30/2024

**TITLE:** *USA v. Brian Levi, et al.*

**COURTROOM CLERK:** L. Rotonda **COURT REPORTER:** J. Bean

**COURT IN SESSION:** 8:34 AM **TOTAL TIME:** 3:01

**TYPE OF PROCEEDING:** PRETRIAL CONFERENCE/MOTION HEARING

**COURT RULING/DISPOSITION:** SEE BELOW

**ATTORNEYS PRESENT FOR PLAINTIFF(S):** **ATTORNEYS PRESENT FOR DEFENDANT(S):**

Mark Probasco

Noah Gelb  
Harry Zimmerman

**PROCEEDINGS:**

**COURT IN SESSION: 8:34 AM**

**COURT:** CALLS CASE, COUNSEL ENTER APPEARANCES.

**MR. ZIMMERMAN:** ADDRESSES COURT REGARDING MATTERS ON AGENDA, PROPOSES

ADDRESSING ISSUES IMPACTING BOTH CO-DEFENDANTS FIRST.

**COURT:** ADDRESSES COUNSEL REGARDING SAME, NOTES A MOTION TO SEVER FILED PREVIOUS

AFTERNOON IS ALSO NOW PENDING BEFORE THE COURT.

**MR. PROBASCO:** ADDRESSES COURT REGARDING SAME, INDICATES GOVERNMENT WOULD BE  
OPPOSED TO SEVERING MATTER.

**MR. GELB:** CONFIRMS DID FILE MOTION TO SEVER MATTER SO AS TO PERMIT CLIENT, DEFENDANT  
BRIAN LEVI, TO PROCEED TO TRIAL. NOTES THAT COMPETENCY ISSUES EXIST AS TO CO-  
DEFENDANT WHICH WILL NEED TO BE RESOLVED.

**COURT:** QUERIES MR. GELB REGARDING WHETHER CLIENT WISHES TO PROCEED ON FEBRUARY 20, 2024, MR. GELB RESPONDS IN THE AFFIRMATIVE.

ASKS THAT DEFENDANT BRIAN LEVI AND COUNSEL STEP OUT OF COURTROOM WHILE COURT HEARS COMPETENCY ISSUES, TO FACILITATE DETERMINATION AS TO WHO WILL BE IN TRIAL.

**8:40 AM** MR. GELB AND DEFENDANT BRIAN LEVI EXIT COURTROOM.

**COURT:** ADDRESSES MR. ZIMMERMAN REGARDING COURT'S BELIEF AS TO BOP'S LIKELY DETERMINE REGARDING COMPETENCY ISSUES. WOULD BE INCLINED TO SEND DEFENDANT TO BOP FACILITY.

ADDRESSES COUNSEL REGARDING COURT'S UNDERSTANDING OF APPLICABLE TIMEFRAMES, WOULD BE INCLINED TO GRANT GOVERNMENT'S REQUEST IN PART AS TO SAME.

**MR. ZIMMERMAN:** INDICATES WOULD LIKE TO PRESENT TESTIMONY FROM PROVIDER IN SUPPORT OF DEFENDANT'S REQUEST.

DEFENDANT DARYL LEVI CALLS RICHARD ABAYTA (SWORN), QUESTIONS ON DIRECT EXAMINATION.

**MR. PROBASCO:** QUESTIONS MR. ABEYTA ON CROSS EXAMINATION.

**COURT:** EXCUSES MR. ABEYTA.

**MR. ZIMMERMAN:** DEFENDANT DARYL LEVI CALLS SIMONE VILJOEN, PH.D. (SWORN), QUESTIONS ON DIRECT EXAMINATION.

**MR. PROBASCO:** QUESTIONS DR. VILJOEN ON CROSS EXAMINATION.

**COURT IN RECESS: 10:02 AM**

**COURT IN SESSION: 10:17 AM**

**MR. PROBASCO:** RESUMES QUESTIONING DR. VILJOEN ON CROSS EXAMINATION.

**COURT:** EXCUSES DR. VILJOEN.

**MR. ZIMMERMAN:** ARGUES IN SUPPORT OF DEFENDANT DARYL LEVI'S REQUEST REGARDING

FURTHER TREATMENT AND EVALUATION.

**MR. PROBASCO:** ARGUES IN SUPPORT OF GOVERNMENT'S PROPOSAL AS TO SAME.

**MR. ZIMMERMAN:** ARGUES IN REBUTTAL REGARDING DISPUTED PROPOSALS.

**COURT:** INDICATES WOULD LIKE TO HAVE MORE ROBUST RECORD AS TO CERTAIN FACETS OF DEFENDANT'S COMPETENCY. WILL ORDER FURTHER EXAMINATION AND FOR DEFENDANT TO BE PLACED IN CUSTODY OF ATTORNEY GENERAL FOR DETERMINATION AS TO APPROPRIATE FACILITY.

DIRECTS MR. PROBASCO TO PREPARE AND SUBMIT ORDER TO COURT, PERMITTING MR.

ZIMMERMAN TO REVIEW AS TO FORM FIRST.

**10:54 AM** MR. GELB AND DEFENDANT BRIAN LEVI RETURN TO COURTROOM.

**COURT:** ADDRESSES PARTIES REGARDING DEFENDANT BRIAN LEVI'S MOTION TO SEVER, QUERIES GOVERNMENT REGARDING SAME.

**MR. PROBASCO:** RESPONDS TO COURT'S QUERIES.

**MR. GELB:** ARGUES IN SUPPORT OF MOTION TO SEVER.

**MR. ZIMMERMAN:** ADDRESSES COURT AS TO SAME.

**MR. PROBASCO:** INDICATES GOVERNMENT WOULD LIKE TO BRIEF ISSUE, ARGUES IN OPPOSITION TO SEVERANCE.

**MR. GELB:** INDICATES WILL LOOK AT CASE CITED BY GOVERNMENT.

**COURT:** THINKS COURT IS LOCKED IN ONCE ORDER AS TO DEFENDANT DARYL LEVI IS ENTERED. HAS SOME SPEEDY TRIAL ACT CONCERNS, IF DEFENDANT ASSERTS SAID RIGHTS, COURT WILL TRY TO MAKE IT HAPPEN. WILL GRANT MOTION TO SEVER AT THE MOMENT, IF ISSUE IDENTIFIED LATER, WILL UNTANGLE AS NEEDED.

QUERIES MR. GELB AS TO WHETHER THERE ARE ANY ISSUES WITH WHICH THE COURT CAN PROVIDE ASSISTANCE.

**MR. GELB:** RESPONDS TO COURT'S QUERIES, ADDRESSES COURT REGARDING POTENTIAL

TESTIMONY REGARDING PRIOR BAD ACTS..

**Mr. Probasco:** ADDRESSES COURT REGARDING SAME.

**Court:** PROVIDES INCLINATION AS TO ADMISSIBILITY OF PROFFERED EVIDENCE, NOTES COURT HAS WRITTEN ON ISSUE IN PREVIOUS OPINIONS.

QUERIES COUNSEL REGARDING SCHEDULING, PATTERN INSTRUCTIONS, PREFERENCES REGARDING STRUCTURE OF TRIAL, NUMBER OF JURORS PARTIES WISH TO SEAT, ANTICIPATED DURATION OF TRIAL COMPONENTS, COUNSEL RESPOND TO SAME.

PROVIDES DEADLINES FOR SUBMISSION OF PARTIES' PROPOSED VOIR DIRE, JURY INSTRUCTIONS AND FILING OF ANY OBJECTIONS AS TO SAME.

**Mr. Gelb:** ADDRESSES COURT REGARDING RESTRAINTS DEFENDANT WILL BE WEARING DURING TRIAL.

**Court:** INDICATES WILL DEFER TO US MARSHALS SERVICE ON THESE POINTS, DIRECTS COUNSEL TO SEEK CLARIFICATION FROM USMS AS TO WHAT THEIR RECOMMENDATION TO THE COURT WILL BE.

**Court in Recess: 11:50 AM**